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No. 09-505

Supreme Court, U.S.
FILED
NOV 2 3 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

480.00 ACRES OF LAND and
GILBERT A. FORNATORA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 218-4600

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. When the federal government induces local authorities to limit, by regulation, the use of property that it someday wants to condemn, must the property owner show that depressing the land value was the government's primary purpose or is demonstrating a connection between the regulation and the federal project sufficient to require calculating just compensation based on the property's original value?

2. What standard governs Fifth Amendment due process claims where a property owner alleges that the federal government manipulated the applicable procedural rules to deny the owner a meaningful opportunity to be heard?

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE* [1]

In this case, the Eleventh Circuit found that the low compensation that petitioner Gilbert Fornatora received for the taking of his land did not violate the Fifth Amendment's Takings Clause. Specifically, the

[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no persons other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

court held that when the federal government induces a local authority to increase regulation on property and then condemns it, the property owner must show that the government's sole motive or primary purpose was to lower his property values if he is to avail himself of the protections of the "scope of the project" rule. Under this rule, a property owner's just compensation does not reflect the diminution in value caused by the imminence of the government's project or government action related to it.

Unfortunately, this decision is consistent with three other circuit court decisions that severely restrict a property owner's protections under the scope of the project rule, but it is inconsistent with federal district court decisions in two other circuits and the Fifth Amendment's Takings Clause.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, Cato publishes the annual *Cato Supreme Court Review* and files *amicus* briefs with the courts. This case is of central concern to Cato because it implicates the rights the Fifth Amendment provides property owners during the condemnation process.

STATEMENT OF THE CASE

This case arises from the federal government's condemnation of petitioner Gilbert Fornatora's property in Florida. The federal government pressured local authorities to enact significantly more onerous land-use regulations in anticipation of taking the property as part of an expansion of a national park. These increased regulations had the natural result of sharply limiting the profitable uses of the property

and thus depressing its value. This depression of the property value benefited the government in that the government ended up paying Fornatora less compensation for the taking. The government's actions during the subsequent condemnation proceedings also suppressed the compensation awarded to Fornatora: it manipulated the federal land commission charged with determining compensation for the affected property owners. This manipulation further denied Fornatora a meaningful opportunity to be heard and to receive just compensation for his taken property.

Fornatora's petition raises two important issues. The first is the proper standard governing the payment of just compensation in condemnation cases where the federal government uses its influence to encourage local governments to increase regulations that also depreciate the value of targeted property. Such actions implicate the Court's "scope of the project" rule. This rule states that increases or decreases in the property's value that result from the project itself may not be considered when determining just compensation. *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 636 (1961).

There is a split within the federal courts as to what standard should be used to evaluate whether a property owner can benefit from the scope of the project rule. In some circuits, owners must show a nexus between the regulation and the federal project or that the federal government induced the local authorities to enact the regulation. Under this "nexus" or "inducement" standard, the impact is what counts; the court looks to whether the federal efforts to regulate the targeted property affected its value, regardless of the motive behind those efforts. *See, e.g.*, *United States v. Certain Lands in Truro*, 476 F. Supp.

1031, 1034-36 (D. Mass. 1979). In other circuits, including the Eleventh Circuit—where Fornatora's case originated—owners cannot avail themselves of the scope of the project rule unless they prove that the federal government's motive or primary purpose in encouraging the regulation was the depression of property values to pay less compensation. *United States v. 480.00 Acres of Land*, 557 F.3d 1297, 1308-11 (11th Cir. 2009).

Importantly, only the nexus or inducement standard comports with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U. S. C. § 4601 *et seq*. Though this Act does not create private rights of action, it does lay out general principles of fair dealing by which the government must abide when it exercises its eminent domain powers. The government has failed to follow these principles here.

The second issue here is the need for a proper standard by which to judge whether a petitioner has received a meaningful hearing—a hearing that is sufficient to protect his due process rights under the Fifth Amendment in the context of a Federal Rule of Civil Procedure 71.1 condemnation process. The lower court's approach to Fornatora's claims regarding government manipulation of the land commission process illuminates the need for a uniform set of rules to use when determining if a given process of calculating just compensation was indeed just.

REASONS FOR GRANTING THE PETITION

The Supreme Court needs to establish uniformity in two central areas of property rights law. First, property owners are receiving different levels of constitutional protection from government activities that diminish their property values in the context of eminent domain. In several circuits, property owners are required to meet a *mens rea* burden of proof—demonstrating that the government's sole motive or primary purpose was to lessen compensation—that means they will only be protected from the most flagrant abuses where government officials are indiscreet enough to admit such a motive. In the district courts of two other circuits, property owners are required to meet a more realistic standard—nexus or inducement—that offers considerably more protection and, most importantly, reflects the spirit and intent of the Takings Clause. The nexus or inducement standard also better fits the purpose of the scope of the project rule, by protecting owners from project-related depreciation regardless of whether bad faith can be proven. The Court should decide that in all takings cases where the federal government encourages a local government to regulate property to facilitate a future federal project and where such regulation results in market depreciation, the property owner need only establish that there was federal-local collaboration and a nexus between the local regulation and the federal project.

Second, the lack of an established standard for evaluating due process, equal protection, and general fairness in the eminent domain land commission process leaves property owners' constitutional right to just compensation unprotected. The Court should recognize a meaningful standard for this process.

ARGUMENT

I. THIS CASE PRESENTS SEVERAL BIG-PICTURE ISSUES

In considering the larger issues embedded in this case, the Court should consider the abusive potential of the eminent domain power, a particular history of its abuse in South Florida, and the purpose and scope of the Uniform Relocation Assistance Act of 1970 as it relates to "condemnation blight" cases like this one.

A. Eminent Domain, Even When Used for Good Reason, Is Prone to Abuse

The U.S. Supreme Court has consistently sided with the government in cases in which property owners have challenged the government's use of eminent domain—"the despotic power." *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 311 (1795); *see also Kelo v. New London*, 545 U.S. 469 (2005); *Hawaiian Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). The Court has acknowledged that it has taken a broad view of the eminent domain power. *Kelo*, 545 U.S. at 479 ("[W]hen this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.'"). This permissive view of eminent domain has led to many documented cases of the taking of private property for private gain. *See, e.g., Building Empires, Destroying Homes: Eminent Domain Abuse in New York* (Institute for Justice) (Oct. 2009) (documenting extensive eminent domain abuse in New York State); Dana Berliner, *Public Power, Private Gain* (April 2003) (five-year state-by-state report examining eminent domain abuses); *see also* Patrick McGeehan, *Pfizer to Leave*

City That Won Land-Use Case, N.Y. TIMES, Nov. 13, 2009, at A1.

But the taking of private property for private gain is not the only threat in the modern eminent domain landscape. The devaluing effects of the government's pre-condemnation activities—for example, newspaper articles announcing plans for condemnation years in advance, or adding zoning restrictions in advance of condemnation—known as "condemnation blight," are a significant threat to property owners' right to just compensation. *See generally* Gideon Kanner, *Condemnation Blight: How Just is Just Compensation?*, 48 NOTRE DAME L. 765 (1973).

Insofar as the Court's takings jurisprudence has broadly interpreted the government's eminent domain powers and thereby encouraged its use for private gain, the Court has a moral obligation to address the long-neglected subject of compensation. Indeed, the problem of condemnation blight as illustrated in this case shows that even when the government follows the original meaning of the Takings Clause and condemns property for a true public use, eminent domain still holds the potential for abuse without an adequate process for calculating just compensation. Having sanctioned this broad eminent domain power, the Court owes it to condemnees to formulate standards governing the calculation of compensation.

This case offers the Court the opportunity to recognize such standards along two elements of the process: the standard for when property owners can invoke the scope of the project rule and the standard for what constitutes a meaningful hearing, sufficient to protect a property owner's right to due process

under the Fifth Amendment, in the context of the federal condemnation process.

B. The Government Has a Long History of Heavy-Handed Condemnation Blight in the Southern District of Florida

Even before the enactment of Fed. R. Civ. P. 71.1, the Fifth Circuit heard a case from the Southern District of Florida regarding the previous, but similar, valuation procedures. *Gwathmey v. United States*, 215 F.2d 148 (5th Cir. 1954). In *Gwathmey*, over 200 property owners contested the valuation of their condemned land and were brought before a single jury with little opportunity to cross-examine government witnesses. 215 F.2d at 152. While the government argued that this process was necessary to prevent exceedingly long and expensive trials, the court noted that it created confusion and placed a heavy evidentiary burden on the jury. *Id.* at 155-56.

The Fifth Circuit found that while expediency and minimized expense were desirable, "the *primary* consideration is the individual landowner's Constitutional right to due process and just compensation". *Id.* at 156 (emphasis in original). Acknowledging the difficulties of multiple-owner condemnation proceedings, the court did not attempt to set down any particular formula, but asked only that chosen procedures continue to give the "full and fair treatment which would be given a single owner". *Id.* at 157. Unfortunately, authorities in South Florida have not heeded that advice.

In 1979, the Fifth Circuit addressed a case rife with procedural errors and government abuse and decided that the appellants had not received just compensation under the Fifth Amendment. *United*

States v. 320.0 Acres, 605 F.2d 762 (5th Cir. 1979). *320.0 Acres* contains troubling parallels to the present case because it involved many parcels of land, and so the government should have dutifully worked to ensure that this complex process was fair, but instead it ensured that it paid property owners as little as possible. *Id.* at 770 ("Unfortunately, the Government attorneys, at least in this case, did not shoulder their responsibility for facilitating justice in these unusual circumstances, but instead assumed the distinctly adversarial role more appropriate to the conventional one-on-one litigation, the cumulative result of which was that the landowners before us on appeal were not afforded the due process guaranteed them by the Fifth Amendment.").

The court detailed its concerns about the behavior of government attorneys in *320.0 Acres* in a significant footnote that described the government's misleading the court and opposing counsel with regard to filings and winning significant motions as a result. *Id.* at n.22. The Fifth Circuit concluded that the lower court and the government did not meet their burden of facilitating justice and instead deprived the landowners of their Fifth Amendment due process rights. *Id.* at 770.

In 1982—after the Fifth Circuit split—the Eleventh Circuit heard a case depressingly similar to the instant case. *US v. 5.00 Acres of Land*, 673 F.2d 1244 (11th Cir. 1982) (per curiam). The Secretary of the Interior began condemnation proceedings to gain approximately 570,000 acres of land for the Big Cypress National Preserve and appointed a commission to determine property values. *Id.* at 1246-47. The property owners in *5.00 Acres* alleged that the commission process was flawed in first hearing 39

pro se proceedings that did not present adequate evidence of property value.

The court highlighted an important fact regarding land commissions, that "[b]ecause the protection of a jury is not afforded, the courts must be particularly vigilant to ensure that every precaution is taken to safeguard the rights of individual landowners". *Id.* at 1247. Still, the Fifth Circuit, in a scant *per curiam* opinion, found that the owners had not presented evidence of bias sufficient to prove a due process violation. *Id.*

While *5.00 Acres* turned on such a factual determination, the present case shows general and continuing problems with land commission proceedings in South Florida, with the government violating this Court's admonition that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *see infra*, Part III.

More recent cases abound—with eminent domain abuse by all levels of governments—but the above three give a flavor for the condemnation blight that has been rampant in the region for quite some time.

C. The Principles Underlying the Uniform Relocation Assistance Act Have Not Been Followed Here

Federal policy reflects the importance of fair dealing when it comes to the deprivation of private property. On January 2, 1971, Congress passed the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. 42 U. S. C. § 4601 *et seq*. Though this Act does not create a private right of action, it does lay out general principles of fairness

by which the government must abide. A review of the Act shows that the government has failed to follow these principles in this case.

The Act's stated intention is to establish "a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance." *Id.* at § 4621(b). The Act also states that "minimizing the adverse impact of displacement is essential to maintaining the economic and social well-being of communities." *Id.* at § 4621(a)(4).

The Uniform Act provides a number of guidelines that such projects must follow to minimize the adverse effects of eminent domain. The guidelines in § 4651, the "Uniform policy on real property acquisition practices," are particularly relevant to this case because they deal with the acquisition and valuation of condemned property. Subsection 1 instructs the head of a federal agency to "make every reasonable effort to acquire expeditiously real property by negotiation."

In this case, as early as the late 1970s, the National Park Service ("NPS") expressed interest in acquiring land, which included Fornatora's tracts, to expand Everglades National Park. Though NPS received Congressional authorization to expand the park in 1989, formal condemnation proceedings did not being until 2000. *480.00 Acres*, 557 F.3d at 1300. More than 20 years passed from the time the government expressed interest in acquiring Fornatora's land to the initiation of condemnation proceedings. Such delays can hardly be considered expeditious.

More importantly, § 4651(3) deals directly with the fair market valuation of property identified for condemnation, particularly in regard to the effect a project can have prior to the official valuation. Subsection 3 provides:

> Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property.

42 U.S.C. § 4651(3).

Congress enacted this provision with the full understanding that to be fair to the owner of the condemned property, the valuation should be made without taking into account the effects of the potential condemnation plan. Regardless of whether a condemnation plan is enacted, the mere possibility of such an action is enough to decrease the property's market value. The obvious impact is that potential buyers are deterred from paying full market value for a tract identified for possible condemnation because of the increased likelihood that the government will deny them use of their new purchase.

In this case, the NPS created a likelihood that it would seek to acquire the Fornatora property before the condemnation proceedings or even the formal authorization. The NPS expressed its ecological concern that the land east of Everglades National Park, which includes Fornatora's tracts, should have been included in the original boundaries of the Park.

480.00 Acres, 557 F.3d at 1300. Combining this suggestion and the federally initiated and funded study, the Everglades Resource Planning Project ("EERP"), the likelihood of the Park's expansion appeared imminent as early as the late 1970s. *Id.* Section 4651(3) obligated the land commission charged with valuing the condemned properties on behalf of the NPS to disregard the effect these government actions had on the fair market value of the condemned properties.

The Uniform Act, particularly § 4651, expresses Congress's clear intent that the owners of private property subject to condemnation are to be dealt with in a fair and expeditious manner. The valuation of their property is not to include any variation caused by the public improvement for which it is acquired or by the likelihood that the property would be acquired.

The federal government engaged in related public improvement through its EERP study that, contrary to its findings, recommended a more stringent zoning regulation, thereby decreasing the market value of the properties. It also expressed its position that the land should be part of the Everglades National Park—increasing the likelihood of its acquisition—which also decreased the market value. Under the Uniform Act's § 4651(3), neither decrease should have been considered in the valuation of the condemned properties. Even though the Act does not create a cause of action for an individual, the government still must follow the statute. "Statutes . . . are not inert exercises in literary composition. They are instruments of government . . . ." *Shirey v. United States*, 359 U.S. 255, 260 (1959).

II. THE SUPREME COURT SHOULD ADOPT THE NEXUS STANDARD INSTEAD OF THE PRIMARY PURPOSE STANDARD BECAUSE THE PRIMARY PURPOSE STANDARD OFFERS PROPERTY OWNERS VIRTUALLY NO PROTECTION

The Supreme Court must provide guidance because lower courts are following different standards: some apply a primary purpose or motive standard and some a nexus or inducement standard. These standards demand significantly different burdens of proof and therefore offer drastically different levels of protection for property owners.

In the Second Circuit, Third Circuit, and Fifth Circuit, courts employ a sole motive or primary purpose standard. *See United States v. Meadow Brook Club*, 259 F.2d 41 (2d Cir. 1958); *United States v. 27.93 Acres*, 924 F.2d 506 (3d Cir. 1991); *United States v. Land*, 213 F.3d 830 (5th Cir. 2000). Under this type of test, a property owner can only avail himself of the benefits of the scope of the project rule and avoid suffering from the depression in value caused by pre-condemnation government regulation when he can show that the government regulated solely or primarily to lower property values and pay less compensation for the taking. This test is not applied in precisely the same manner across the Second, Third, and Fifth Circuits.

In the Second Circuit, the property owner must prove that the government's sole motive in opposing a rezoning that would have increased the property value was to depress the property values in advance of condemnation. *Meadow Brook Club*, 259 F.2d at 45. This test also requires that no coincident government rationales for the action exist. *Id.*

In the Third Circuit, the test is even more demanding; proof of sole motive is not sufficient to avail property owners of the scope of the project rule's protection if any other factor could be pointed to as the proximate cause of the local zoning decisions. *27.93 Acres*, 924 F.2d at 514 (noting that even if the court accepted the appellant's argument that the federal government played some role in the local government's denial of appellant's zoning request, that would not prove that the government's action was the "but for" cause).

The Fifth Circuit has adopted a slightly less demanding test than the Second or Third Circuits. There, a property owner must show that the government's primary purpose in denying his permit was to depress property values before condemnation. *Land*, 213 F.3d at 835-36. But this test still requires a level of proof that only the most incompetent government bureaucrats would make available.[2]

These three cases—and the Eleventh Circuit's decision in *480.00 Acres*—leave property owners in those jurisdictions woefully unprotected from eminent domain abuse because the burden of proof they require could rarely be met other than when a careless

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[2] In her *Kelo* dissent, Justice O'Connor expressed concern regarding the court's ability to "divine illicit purpose." *Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting) ("The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing."). With such deferential tests, it is virtually impossible to prove government malfeasance in takings cases. *See also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992) (criticizing the just compensation test as one which determines "whether the legislature has recited a harm-preventing justification for its action," which amounts to nothing more than "a test of whether the legislature has a stupid staff").

government official states on the record that a zoning change was done for the primary purpose of depressing property values or whatever particular language would be necessary for the other versions of the standard. Further, these decisions are at odds with decisions from federal district courts in the First and Fourth Circuits.

District courts in the First and Fourth Circuits have applied a standard that is more realistic in promoting the policy underlying the scope of the project rule. Just as important, these cases have included facts more similar to those present here than the facts of the cases on the other side of the split. In the Second, Third, and Fifth Circuit cases, the government had taken steps to influence local authorities to maintain zoning status quo rather than approving changes that might increase property values in advance of a taking. When property owners protested that federal interference in the local process had deprived them of the additional compensation they would have been owed under the decreased regulatory regime, the courts were unmoved. The two district court cases are distinctly different because the federal government allegedly initiated to lobby for large scale downzoning to protect the contemplated project area from further development. The Eleventh Circuit did not appreciate this important factual distinction and declined to protect petitioners under the scope of the project rule. *480.00 Acres*, 557 F.3d at 1300.

In the District of Maryland (in the Fourth Circuit) and the District of Massachusetts (in the First Circuit), courts have reviewed cases factually similar to *480.00 Acres* using a standard that offers property owners a measure of protection from eminent domain

abuse. *United States v. 222 Acres of Land*, 324 F. Supp. 1170 (D. Md. 1971) and *United States v. Certain Lands in Truro*, 476 F. Supp. 1031 (D. Mass. 1979).

In Maryland, the federal government pressured the state to prohibit development of shoreline property in part to protect the public safety and welfare and in part in anticipation of federal eminent domain proceedings. *222 Acres*, 324 F. Supp. at 1175 (U.S. Secretary of the Interior asked the governor of Maryland not to allow development of the specific areas because allowing such development would enhance land values and thus require higher compensation once eminent domain proceedings began). After the federal government eventually condemned the property, the court considered the just compensation issue. It rejected the government's argument that development prohibitions should not be taken into account in calculating property values. The court decided that even though the regulations at issue served some general public safety and welfare benefit, the federal government had induced their enactment and therefore could not benefit from them during the calculation of just compensation.

This decision enabled the property owners to be protected by the scope of the project rule and receive compensation based on the value of their property before the state prohibited further development on the recommendation of the federal government. *Id.* at 1180. Unlike the Second, Third, Fifth, and Eleventh Circuits, the District of Maryland decided that no showing of primary purpose or sole motive was required; instead, proof that the federal government had induced the local authorities to regulate was

sufficient to protect the property owners from the diminution of value caused by those regulations. *Id.*

In Massachusetts, the federal government suggested to local Cape Cod officials that certain land use restrictions be instituted. This suggestion came in anticipation that the federal government would take land to complete a national seashore project. *United States v. Certain Lands in Truro*, 476 F. Supp. 1031, 1032 (D. Mass. 1979). The affected property owners sought the protection of the scope of the project rule, arguing that the federal government caused town officials to restrict uses within the seashore area differently than zoning applied elsewhere in the town. *Id.* at 1035. The District of Massachusetts decided that the regulations were indeed motivated and induced by the federal government—even if they were valid exercises of the local government's police power—and therefore any diminution in value they caused could not be taken into account in determining how much compensation the government would pay the affected property owners. *Id.* at 1035-36. Like the District of Maryland, the District of Massachusetts decided that proof that the federal government had induced the local authorities to regulate was sufficient to prevent the federal government from taking advantage of paying a reduced level of compensation reflecting the diminishing effect of the regulations. *Id.*

III. THE SUPREME COURT SHOULD ADOPT A STANDARD FOR THE PROCESS OF CALCULATING JUST COMPENSATION THAT IS CONSISTENT WITH DUE PROCESS, EQUAL PROTECTION, AND THE GENERAL FAIRNESS STANDARDS THE GOVERNMENT IS REQUIRED TO FOLLOW IN MANY SETTINGS

In addition to clearing up the split of authority regarding the standard for applying the scope of the project rule, the Supreme Court must also establish a standard for evaluating whether the calculation of just compensation is consistent with due process, equal protection and general fairness. By allowing the government first to bring unrepresented property owners before the land commission to establish lower compensation precedent, and then to use that precedent later to pay less compensation to represented property owners—despite their presentation of evidence to the contrary—the Eleventh Circuit failed to protect property owners in the face of significant constitutional concerns.

Indeed, property owners who came to court with counsel and were then dismissed and brought back later when precedent had been stacked against them were denied a meaningful opportunity to be heard. This Court has recognized petitioners' right to an opportunity to be heard—beyond *pro forma* proceedings—in a variety of settings, and it should recognize that right in this setting as well.

The courts below failed to protect petitioner's procedural due process rights by allowing the federal government first to bring unrepresented property owners before the land commission to establish a precedent for lower compensation, then later wielding

that precedent against represented property owners who presented individualized evidence warranting a higher valuation for their property. Justice Pitney is often cited for his statement that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This is particularly important when the due process requirement arises from the deprivation of a fundamental right.

Justice Jackson noted that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Here, the government manipulated the sequencing of cases in order to deny represented property owners a meaningful opportunity to be heard: it denied them the opportunity to present individualized evidence to open-minded commissioners by arranging the hearing schedule to first set low valuation precedents in *pro se* hearings. (The record below shows that government attorneys voluntarily dismissed from the early trial groups any defendant landowners for whom counsel entered an appearance).

The Supreme Court's jurisprudence broadly supports this principle—the right to a meaningful hearing—across various areas of law. Whether it is a death row inmate's plea to be allowed to make arguments that could prevent his execution, a criminal defendant's desire to present evidence in his own defense, or a property owner's need for adequate notice of condemnation proceedings, this Court has

held that due process requires petitioners be provided the opportunity to be heard as a matter of fundamental right. *See generally, Panetti v. Quarterman*, 551 U.S. 930 (2007); *Chambers v. Miss.*, 410 U.S. 284 (1973); *Schroeder v. New York*, 371 U.S. 208 (1962). Justice requires that if one is to be deprived of life, liberty or property, one must be provided with a meaningful hearing.

In *Panetti*, the petitioner sought habeas review of his capital conviction for murder in light of his apparent mental illness. Even though he tried to present evidence of his illness, Texas state courts and the Fifth Circuit held that a state can execute a person with mental defects convicted of a capital offense if the person is aware of the punishment and the crime for which he will receive it. *Panetti*, 448 F.3d at 818 (citing *Ford v. Wainwright*, 477 U.S. 399, 421-22 (1986)). In his majority decision, Justice Kennedy pointed out that *Ford* also required that "[o]nce a prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Panetti*, 551 U.S. at 949. This Court protected the petitioner's due process right to present evidence of his severe delusions, delusions that prevented him from appreciating the gravity of the punishment that would take his life.

Since its inclusion in the Bill of Rights, the Sixth Amendment has provided criminal defendants with the right to confront and call witnesses in their defense. Exercising this right, the petitioner in *Chambers* called a witness to introduce the witness's written confession of guilt for the crime with which the petitioner was charged. Surprisingly, on cross-

examination, the witness retracted and provided an alibi. *Chambers*, 410 U.S. at 287-88. The Mississippi Supreme Court upheld the trial court's denial of the petitioner's motion to reexamine the witness as adverse and to exclude a plethora of other statements of confession made by the witness. *Id.* at 291-94. In an opinion reversing that judgment, Justice Powell noted that "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Id.* The U.S. Supreme Court thus overruled Mississippi's "Voucher Rule," which prevented defendants from cross-examining their own witnesses based on the archaic notion that by calling a witness, one "vouches for his credibility." *Id.* at 295 (citation omitted). Powell concluded "that the exclusion of this critical evidence, coupled with the State's refusal to permit [petitioner] to cross-examine [the witness], denied him a trial in accord with traditional and fundamental standards of due process." *Id.* at 302.

These cases deal with the due process protections afforded to criminal defendants for the fundamental rights to life and liberty, but property rights require the protection of due process as well. In *Schroeder*, for example, the City of New York decided to invoke its legislated power to divert a river 25 miles upstream toward the petitioner's property. *Schroeder*, 371 U.S. at 208. New York provided statutory notice to the City Record, with ads in two major newspapers and two local papers. Yet none included the procedure to contest the action or claim compensation and none were posted in the vicinity of petitioner's then-vacant premises. *Id.* The petitioner was thus unaware of the proceedings and failed to file a claim for damages within the prescribed three-year period. *Id.* at 210-11. Justice Stewart, writing for a unanimous

Court, held that the notice was insufficient and denied the petitioner the constitutionally requisite "opportunity to present their objections." *Id.* at 212. Stewart found that the right is so important that the government is obliged to give personal notification of proceedings, which could have been provided by a simple posted letter. *Id.* at 214.

The right to a meaningful opportunity to be heard has also been upheld in civil forfeiture cases. In *Windsor v. McVeigh*, a federal district court marshal seized the property of a Confederate Army officer under the act of Congress of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." *Windsor v. McVeigh*, 93 U.S. 274, 275 (1876). Though the owner filed a claim asserting his right, the lower court struck down his motion, denying him a hearing. *Id.* at 276. Even during such a volatile period as Reconstruction, this Court upheld the right to an opportunity to be heard for a former rebel in defense of his property, asserting that whenever one "is assailed in his person or his property, there he may defend, for the liability and the right are inseparable." *Id.* at 277.

This Court has continued to uphold the same principle in more recent civil forfeiture cases. *See, e.g., United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993). In *James Daniel Good*, petitioner's real property was forfeited due to his drug crime conviction. *Id.* at 46. Even though the federal civil forfeiture statute allows *ex parte* confiscation, the Court held that, absent exigent circumstances, the government must provide an opportunity to be heard before the seizure of property. *Id.* at 62.

Finally, the Court has recognized that the federal government has a general obligation to fairness in the eminent domain context. The Court has repeatedly noted that fairness and justice are inherent in the Takings Clause. *See, e.g.*, *Kelo*, 545 U.S. at 497 (noting that Fifth Amendment requirements promote fairness as well as security); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002) ("The concepts of 'fairness and justice' . . . underlie the Takings Clause"); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (noting the Fifth Amendment's concern for fairness and justice). The Court should decide that this obligation was not met here by the process approved by the Eleventh Circuit.

Indeed, here the government denied Fornatora his meaningful opportunity to be heard by manipulating the scheduling of hearings in order to establish low valuation precedents, thereby violating his due process rights.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari in this case.

Respectfully submitted,

ILYA SHAPIRO
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 218-4600

November 2009